Office Supreme Court, U.S.
FILED
MAY 9 1962
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

October Term, 1961.

No. 831.

CAMDEN TRUST COMPANY,

*Petitioner,*

*v.*

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY,

and

DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP,

*Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

## REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION OF COMPTROLLER OF THE CURRENCY AND INTERVENOR

BERNARD G. SEGAL,
SAMUEL D. SLADE,
*Attorneys for Petitioner.*

SCHNADER, HARRISON,
SEGAL & LEWIS,
1719 Packard Building,
Philadelphia 2, Penna.,
*Of Counsel.*

May 8, 1962.

International, 711 So. 50th St., Phila. 43, Pa.

## TABLE OF CASES CITED.


| | Page |
|---|---|
| Commercial State Bank of Roseville v. Gidney, 174 F. Supp. 770 (D. C. D. C., 1959) affirmed per curiam and petition for rehearing denied, 278 F. 2d 871 (C. A. D. C., 1960) | 5 |
| Concord First National Bank v. Hawkins, 174 U. S. 364 (1899) | 3 |
| Helvering v. N. Y. Trust Co., 292 U. S. 455 (1934) | 4 |
| National Bank of Detroit v. Wayne Oakland Bank, 252 F. 2d 537 (C. A. 6, 1958) certiorari denied, 358 U. S. 830 | 3, 4 |
| Skidmore v. Swift & Co., 323 U. S. 134 (1944) | 5 |
| United States v. Leslie Salt Co., 350 U. S. 383 (1956) | 6 |
| United States v. Shreveport Grain & Elevator Co., 287 U. S. 77 (1932) | 5 |


## MISCELLANEOUS.


| | Page |
|---|---|
| 76 Cong. Rec. 1998 | 8 |
| 1 Davis, Administrative Law Treatise (1958), § 5.06 | 5 |
| 3 Fletcher, Cyclopedia Corporations (Perm. Ed.) pp. 838, 848, 856 | 3 |
| Hearings Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking (1930), 71st Cong., 2d Sess. | 9 |
| McFadden, The Chain Bank Crash in Georgia, 19 Am. Bankers Ass'n. J. 137 (1926) | 9 |
| S. Rept. 584, 72d Cong., 1st Sess. Pt. II | 8 |
| 12 U. S. C. §§ 21-27 | 2 |
| 12 U. S. C. § 27 | 2, 4, 5, 6 |
| 12 U. S. C. § 36(c) | 2, 3, 4, 5, 6, 8, 9 |

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 831.

CAMDEN TRUST COMPANY,

*Petitioner.*

*v.*

RAY M. GIDNEY, COMPTROLLER OF THE CURRENCY, AND DELAWARE VALLEY NATIONAL BANK OF DELAWARE TOWNSHIP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

## REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION OF COMPTROLLER OF THE CURRENCY AND INTERVENOR.

### Introductory Statement.

The central issue in this case is whether, on the uncontroverted facts adduced by petitioner, the Comptroller of the Currency was under a duty to reject the application for the proposed "new" bank here involved on the ground that the application in substance and effect constituted an attempt to obtain a forbidden branch bank. In pressing its

contention on this issue, petitioner urges that the National Bank Act must be read as an integrated whole so that the new bank provisions (12 U. S. C. §§ 21-27) can not be used to evade the language and purpose of the statute's branch banking provisions (12 U. S. C. § 36(c)).

In both courts below, the Comptroller's primary defense was that, under the 1864 statute (12 U. S. C. § 27), he had absolute power to grant a new bank charter. Since an argument that the form of the application alone should control would be unpalatable and since he could not argue that the proposed "new" facility was a *bona fide* independent bank, the Comptroller was forced to contend that he has at all times possessed the absolute power knowingly to charter affiliates. This was the statutory contention which he urged in his motion for summary judgment, and pressed in briefs and argument in both courts below. Thus, the issue framed by the parties in the courts below was one of federal statutory law.

Intervenor, in its brief in opposition, faces the statutory issue presented by this case and attempts to construe the National Bank Act as empowering the Comptroller, without any restrictions, to authorize "affiliates". The petition for certiorari, we submit, refutes this construction and we will further discuss specific aspects of intervenor's contention herein, *infra*, pp. 8-10. The Comptroller, in his brief in opposition, does not squarely face the statutory issues which were mooted below but, rather, makes every attempt to avoid presenting to this Court the same broad claim of statutory power which he so insistently urged in the lower courts. Instead, he argues that the "new" bank is not in form a branch and is therefore not, in fact, a branch.[1] He makes this argument as a means of avoiding a

1. In support of this argument, the Comptroller enumerates the formal consequences of separate incorporation. He does not discuss, or even advert to, the uncontroverted facts of record advanced by petitioner which show the occasion for the "new" bank application, the identity of control between the "new" bank and Haddonfield National, the location of the "new" bank within the competitive territory of Haddonfield National and the other facts

discussion of the National Bank Act and the nature of the power which Congress has vested in him in that statute. He has thus here assumed the very issue in question and none of the material to which he does advert warrants this assumption.

## A. The Comptroller's Brief in Opposition.

1. In **National Bank of Detroit v. Wayne Oakland Bank**, 252 F. 2d 537 (C. A. 6, 1958) *certiorari denied*, 358 U. S. 830, the Comptroller of the Currency argued for a reading of the branching statute, 12 U. S. C. § 36(c), which would have permitted him to authorize a national bank branch in any locality where a state bank had a branch regardless of state law provisions prohibiting other state banks to branch in localities already served by a state or national bank branch. In other words, the Comptroller argued for a parallel system of branching rather than a system of precise equality of competition between state and national banks. Thus, had the instant case arisen prior to the decision in **Wayne Oakland**, *supra*, the Comptroller's position would have been that he had the power to authorize Haddonfield National to branch in Delaware Township, because petitioner had a branch in that township.

---

discussed in the petition, pp. 4-6. In stressing form and picking among the consequences of that form, the Comptroller completely ignores the principle that the corporate privilege may never be invoked to defeat the purpose of the statute under which the privilege is sought. Petition, p. 10, fn. 10. Whether this principle is violated depends upon the underlying substance of the transaction as this Court has recognized on many occasions. For example, in **Concord First National Bank v. Hawkins**, 174 U. S. 364 (1899), this Court stated that, if one national bank were permitted to acquire the stock of another, there would be, in form, two separate corporate entities but the acquired bank would be, in substance, a branch.

Here, the controlling facts should be recognized to be not only that the intention is that the "new" bank be run under common management and control with Haddonfield National but that, under the law of fiduciary relationships, it must be. 3 Fletcher, **Cyclopedia Corporations** (Perm. Ed.) pp. 838, 848, 850.

That position was foreclosed to him by the decision in **Wayne Oakland** which read 12 U. S. C. § 36(c), the branching statute, as embodying a policy of precise competitive equality. The Court of Appeals for the Sixth Circuit held that where the state branching law permits branching to a state bank only where there are no existing branches in the locality, then 12 U. S. C. § 36(c), incorporating that state law by reference, permits branching to a national bank only where there are no existing branches, state or national, in the locality.[2]

It is, thus, the decision in **Wayne Oakland** which, in reality, gives rise to the claim of power made by the Comptroller in this case. What the decision in **Wayne Oakland** forbade the Comptroller to do under 12 U. S. C. § 36(c), he is here trying to do under 12 U. S. C. § 27. And the means by which he intends to avoid state law restrictions on branching, as is apparent in the instant case, is favorably to entertain an application for a controlled "affiliate", where a branch would be prohibited by 12 U. S. C. § 36(c). In the light of this attempt to avoid **Wayne Oakland**, the Comptroller's misconstruction of petitioner's position becomes plain. Petitioner does not argue that the Comptroller's power to charter *bona fide* new banks must be measured by state law, as the Comptroller asserts. Comptroller's Brief in Opposition, pp. 6-7. Petitioner does argue that the state law measure selected by Congress in 12 U. S. C. § 36(c) cannot be avoided or nullified through a manipulation of form.

2. As we have stated, the core of this case is whether the National Bank Act must be read as an integrated whole—whether Section 27, the new bank provision, can be used by the Comptroller to defeat the Congressional purpose and policy embodied in 12 U. S. C. § 36(c), the branching provision. *Cf.* **Helvering v. N. Y. Trust Co.**, 292 U. S. 455, 464-465

2. The New Jersey statute here involved is substantially the same, with regard to branching restrictions, as the Michigan statute involved in **Wayne Oakland**.

(1934). The Comptroller does not attempt to meet this issue squarely; he never discusses or tries to draw support from these sections of the National Bank Act. He merely asserts that he "* * * has never considered 12 U. S. C. § 36 as a limitation of his authority * * *"[3] under Section 27, regardless of the circumstances in which that section is invoked. In connection with this assertion, he points to an affidavit which he filed in the district court (R. 96).

There is a well established rule that "* * * rulings, interpretations and opinions * * *" by those charged with the administration of a statute "* * * constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. * * *" **Skidmore v. Swift & Co.**, 323 U. S. 134, 140 (1944). But the Comptroller cannot avail himself of this rule. He conducts no hearings, publishes no opinions or interpretations in connection with the grant or denial of charters. *Cf.* **Commercial State Bank of Roseville v. Gidney**, 174 F. Supp. 770 (D. C. D. C., 1959) *affirmed per curiam* and petition for rehearing denied, 278 F. 2d 871 (C. A. D. C., 1960). There is thus no body of regulations, published interpretations or opinions to which courts and litigants may resort. **United States v. Shreveport Grain & Elevator Co.**, 287 U. S. 77, 84 (1932); 1 Davis, **Administrative Law Treatise** (1958), § 5.06.

The fact here is that this case marks the first occasion on which a Comptroller of the Currency has publicly claimed absolute power under Section 27 without reference to Section 36(c)—the power to use the new bank authority to provide a physical facility in the form of an affiliate to a national bank which desires but cannot obtain a branch. There is no occasion on which the Comptroller has advised Congress of this asserted power or its exercise. Each of the nine instances referred to in the Comptroller's affidavit

---

3. Comptroller's Brief in Opposition, p. 10, ftn. 7.

in this case was reported to Congress only as the chartering of a new bank and no mention was made of affiliation. Annual Report, 1944, Table #3, p. 23, Charter #14497; Annual Report, 1946, Table #3, p. 22, Charter #14552 and #14567; Annual Report, 1950, Table #4, p. 29, Charter #14650; Annual Report, 1955, Table #3, p. 54, Charter #14753, and p. 53, Charter #14759; Annual Report, 1956, Table #3, p. 74, Charter #14799.[4] In the light of the almost universal Congressional condemnation of affiliate and chain banking,[5] and the intensely considered and debated legislative action which added a carefully defined branching privilege to the basic system of unit independent national banks,[6] it would surely seem that the Comptroller's *ad hoc* affidavit is entitled to no weight.[7]

3. The Comptroller also asserts that his view—that he can exercise power under 12 U. S. C. § 27 without reference to 12 U. S. C. § 36(c)—is "* * * consistent with a recent decision of the Court of Appeals for the Fifth Circuit, *State of Texas v. National Bank of Commerce of San Antonio*, 290 F. 2d 229, *certiorari denied*, 368 U. S. 832." Comptroller's Brief in Opposition, p. 7, ftn. 6. There is no warrant for the Comptroller's reliance on that case. There, the State of Texas sought to read 12 U. S. C. § 36(c) as preventing the Secretary of Treasury from designating a national bank as a government financial agent to perform limited banking functions at a federal military installation. The Court of Appeals for the Fifth Circuit rejected this argu-

4. It should be noted that the cautious wording of the Comptroller's affidavit falls far short of meeting the issue in this case. The affidavit speaks of chartering **new** national banks "affiliated with existing banks" but does not say whether the "existing banks" are state or national, whether the affiliation took place by virtue of acquisition of ownership after approval, or whether the charters were issued in circumstances comparable to those here presented.

5. Petition, pp. 18-19.

6. Petition, pp. 14-16.

7. *Cf.* **United States v. Leslie Salt Co.**, 350 U. S. 383, 396 (1956).

ment. The Solicitor General stated to this Court (Memorandum for the United States as *Amicus Curiae* in Opposition, October Term, 1961, No. 247, pp. 4-5):

> "* * * The court of appeals was correct in rejecting petitioner's attempt to equate the limited banking facilities operated by respondents with a commercial branch banking operation, and thus to bring into operation 12 U. S. C. 36(c) (Pet. App. 11) which permits national banks to establish and operate branch banks only where state law permits. There are similarities between the facilities respondents maintain and a branch bank but there are also fundamental differences.[2] Only by a strained interpretation can 12 U. S. C. 36, dealing with commercial branch banks, be read as limiting the 'reasonable duties' a national bank may perform, under 12 U. S. C. 90 and 290, when acting as a financial agent of the government and as a depositary of public money.

"2. A commercial branch bank is ordinarily a self-sustaining economic enterprise; the limited facilities provided by respondents, pursuant to 12 U. S. C. 90 and 12 U. S. C. 265, on the other hand, are, in reality, subsidized by the government which provides, without charge, banking quarters, military guards, janitorial services, and utilities. Moreover, for operating losses sustained, the banks are, in effect, reimbursed by the Treasury." *

4. Contrary to the Comptroller's assertion (Comptroller's Brief in Opposition, p. 10), petitioner neither confuses nor equates branch banking and chain or group banking. Nor does Congress. Unit banks and branches are authorized forms of banking, coming into existence as the result of official charter and approval. Chain or group banking systems have not come into existence through official charter or approval, but, rather, have resulted from private activity, such as stock purchase or acquisition, over which there was

* Footnote quoted from text of Solicitor General's Memorandum.

no governmental control. Petition, pp. 16-18. Congress has accorded entirely separate treatment to the areas of creation and authorization of new banks and branches, and the existence of chain and group bank systems. On the one hand, Congress retained the concept of the unit independent national bank while adding a carefully controlled branching privilege. Petition, pp. 14-16. On the other hand, it has imposed controls, in 1933 and again in 1956, to the maximum extent legally and factually possible on what was and is viewed as an evil. Petition, pp. 18-19.[8]

If there is a confusion here, it is the Comptroller's confusion in seeking to find in the Congressional attempts to control the evils attendant on chain and group banking, a source of power in himself to participate in the formation of chains and groups of banks.[7] The point is illustrated by placing in context and completing the quoted remark of Senator Glass in the 1933 debates cited in the Comptroller's Brief in Opposition at p. 10, ftn. 8. Senator Glass, the principal proponent of the bill which became 12 U. S. C. § 36(c), was refuting indiscriminate attacks on all forms of multiple banking, including branch banking, by, among others, Senator Huey Long. Senator Glass went on to say that chain banking "* * * has gone on for years and has proved a menace wherever tried." 76 Cong. Rec. 1998.

### B. Intervenor's Brief in Opposition.

In the main, intervenor argues that the imposition by Congress of controls on chain and group banking, rather

8. The separateness of treatment, evident from the reports which accompanied the 1933 legislation (Petition, pp. 15, 18), is underscored by the Minority Views filed by Senator Norbeck, Chairman of the Senate Committee on Banking and Currency, on behalf of himself and other members of the Committee. S. Rept. 584, 72d Cong., 1st Sess. Part II. The Minority Views strongly supported those portions of the proposed legislation which imposed controls on "affiliates," but disagreed just as strongly with the section which authorized branching. Senator Norbeck and those with him adhered to the concept of the independent unit national bank.

than the abolition of these forms of multiple banking, somehow gives rise to a power in the Comptroller to authorize these forms of banking institutions without reference to 12 U. S. C. § 36(c). We have answered this contention above. As we have shown, groups and chains of banks came into existence as a result of private activity; Congress rejected, as impossible, proposals to eliminate or abolish these systems but did impose, in 1933 and again in 1956, the maximum amount of control legally and practically possible (Petition, pp. 18-19). A power in the Comptroller cannot be spelled out from these factors.

"Nor does the universal condemnation by Congress of chain and group banking permit intervenor's argument that Congress, in 1933, was simply offering branch banking as an alternative form of multiple banking to national banks. In making this latter argument, intervenor refers to a colloquy between then Comptroller of the Currency Pole and Representative Goldsborough at the 1930 hearings on branch, chain and group banking." Intervenor's Brief in Opposition, pp. 15-16. Representative Goldsborough, a staunch supporter of pure unit banking (Hearings, *supra*, Vol. I, p. 42) opposed Pole's recommendation that he be empowered to authorize branch banking. The Congressman, accordingly, questioned Pole's contention that authorized branch banking would cure the evils attendant upon chain and group banking by inducing existing chains or groups to convert to branch systems. Mr. Pole admitted, sensibly enough, that many of those who formed groups or chains would not be interested in coming under a carefully supervised banking system.[9] *Cf.* McFadden, **The Chain Bank Crash in Georgia**, 19 Am. Bankers Ass'n. J., 137 (1926).

Clearly, as we have shown (Petition, pp. 15, 17), one of the purposes of the 1933 branching legislation was to pro-

9. Hearings Before the Committee on Banking and Currency of the House of Representatives on Branch, Chain and Group Banking (1930), 71st Cong., 2d Sess.

vide an authorized and controlled form of multiple banking in which the drive toward bigness could be realized. But it is a far cry from this to suggest that a realization of this objective had the simultaneous result of recognizing chains and groups as fully equal and approved systems of multiple banking. And it is an even farther cry to suggest that Congressional provision of an authorized and controlled form of multiple banking created a power in the Comptroller to augment the very system against which Congress had so deliberately provided an alternative.

### C. The Attack on the Good Faith of the Commissioner of Banking and Insurance of New Jersey.

Throughout this proceeding, the State of New Jersey has strongly supported petitioner's position. Briefs have been submitted in both courts below by the Attorney General of that State and an affidavit by the Commissioner of Banking and Insurance, prepared after consultation with the Attorney General, was filed (R. 47a-50a). That affidavit stated, *inter alia*, that "* * * if a State bank in New Jersey sought to achieve a new banking facility in a municipality statutorily foreclosed to additional branching, by means of charter application for a new bank to be run by the same management, under the same policies, and as an affiliate of such State bank, the application would be considered as a branch application and rejected as such" (J. A. 49a-50a). As the argument on behalf of New Jersey made plain, this view was not a mere matter of policy but was compelled by the Attorney General's best appraisal of New Jersey statutory and decisional law. Stenographic Transcript, pp. 67, 69.

The Comptroller and the intervenor suggest to this Court that, on one occasion in 1959, the Commissioner of Banking and Insurance of New Jersey had, in fact, authorized a new banking facility, the State Bank of Rahway, in precisely the same circumstances as those here involved. Comptroller's Brief in Opposition, p. 8, ftn. 6; Intervenor's

Brief in Opposition, p. 27. The probative value of the Commissioner's affidavit is said by the intervenor thus to be nullified by the "fact of record". Brief in Opposition, p. 27.

It is the "fact of record" which should be disregarded. The Deputy Attorney General was handed the Comptroller's and intervenor's material, dealing with the Rahway Bank, at the district court hearing in this case on Monday, August 7, 1961. Stenographic Transcript, p. 72. The Deputy Attorney General was given five days in which to respond to this new matter. On August 11, 1961, a supplementary memorandum dealing with the accusation was forwarded to the district court. On August 12, the district court order granting the Comptroller's motion for summary judgment was mailed out.[10]

Neither court below advertised to the Rahway Bank matter. But petitioner does not believe that the accusations here renewed by both the Comptroller and the intervenor should go unchallenged. Further the office of the Attorney General of New Jersey has specifically requested petitioner to present its position on this charge to this Court.

The procedure followed in the district court, and the time sequence, did not permit New Jersey to make a formal record by way of affidavits. The supplementary memorandum filed by New Jersey analyzed the relationship between the Community Bank of Linden and the State Bank of Rahway to show that Rahway has different top management from Community and substantially different stock ownership; that Rahway was not intended to be, and was not represented to be, a bank that would operate under the same management and policies as Community. New Jersey provides public hearing, after notice, on bank applications, with an absolute right of judicial review. The issue of the

10. As shown by the docket entries, there was a time lag in the actual filing by the clerk of both these papers. The district court order was filed on August 14, the supplementary memorandum by New Jersey on August 15. R. 3a.

relationship between Community and Rahway was considered at the hearing held on the application and the Commissioner decided, on all the facts, that Rahway would operate independently—a position entirely consistent with his affidavit in this case. No appeal from his decision was taken.

## Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD G. SEGAL,
SAMUEL D. SLADE,
*Attorneys for Petitioner.*

SCHNADER, HARRISON, SEGAL
& LEWIS,
*Of Counsel.*

May 8, 1962.